IN THE

Supreme Court of the United States

OCTOBER TERM 1943.

NO.

THE DIXIE MARGARINE COMPANY,
Petitioner,

vs.

A. H. SHAEFER, Formerly Deputy Collector of Internal Revenue for the District of Tennessee,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below

The opinion of the Circuit Court of Appeals is reported at 139 F. (2) 221.

Jurisdiction.

The grounds on which the jurisdiction of this court is invoked are stated in the petition, page 2.

Statement.

A statement of the case has been set forth in the petition, page 3 and in the interest of brevity is not repeated here.

Statute Involved.

The statute involved, Sec. 3226 R. S. is cited and quoted in the petition, page 2.

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that Petitioner was not entitled to an equitable construction of Sec. 3226 R. S. and that that section was controlling and that there could be no exceptions to it, no matter what the circumstances were.

2. In holding that the Bill of Complaint did not sufficiently allege fraud to entitle the case to an equitable consideration.

3. In holding that the Bill of Complaint did not set out facts showing fraud and concealment sufficient to hold the Respondent a constructive trustee, and make the statute of limitations inapplicable.

4. In holding that a claim for refund is always a necessary prerequisite to suit.

5. In holding that by applying the analogy of the Statute of Limitations, Petitioner was barred by the lapse of time and that equity would not relieve.

Summary of Argument.

I. Congress could not have intended that there should be no exception to Sec. 3226 R. S. when by its literal construction it would be the means of protecting fraud and concealment, and allow one to profit by his own crime.

II. The court below refused to give equitable consideration to this case, holding, "But fraud cannot be averred in general terms and the complaint alleges no fraudulent conduct on the part of the defendant."

III. The Respondent by illegally taking and retaining the property of Petitioner, became a constructive trustee.

IV. Courts of equity are not bound by the Statutes of Limitations or compelled to apply the analogy of the Statute of Limitations where the circumstances are such as to constitute the Respondent a constructive trustee, and show him to be guilty of actual fraud.

ARGUMENT.

I. Congress could not have intended that there should be no exception to Sec. 3226 R. S. when by its literal construction it would be made the means of protecting fraud and concealment.

The Court below held that there could be no exception to Sec. 3226 R. S. and unless its terms are strictly complied with there can be no recovery. This holding is in conflict with all authorities on statutory construction which hold that legislative intent and meaning are to be the guide and should prevail over the letter of the statute. It is certain that in enacting Sec. 3226 a case as the one at bar could not have been in the minds of the law-makers, or as said by the Court in *Riggs* v. *Palmer*, 115 N. Y. 506:

> "If such a case had been present in their minds and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it."

Congress apparently never contemplated that a fraud would be committed by the Commissioner, but provided for cases of fraud by taxpayers by enacting Sec. 276 (a) of the Internal Revenue Code which provides that in the case of a false or fraudulent return the tax may be assessed or a proceeding in court for its collection may be begun without assessment at any time. The limitation statutes have no application in such cases. It cannot be presumed that Congress intended to protect the government against fraud by the tax-payer and leave the tax-payer without remedy against fraud by the Commissioner.

Courts deal with statutory construction perhaps more than with any other one subject of litigation, and the rules as to legislative intent are well established. Crawford, Statutory Construction, Sec. 177 summarizes them as follows:

> "Since the basic and underlying purpose of all legislation, at least in theory, is to promote justice it would seem that the effect of the statute should be of primary concern. * * * As a result the court should strive to avoid a construction which will tend to make the statute unjust (31 F. (2) 612) oppressive, (2 F. (2) 862) unreasonable, (31 F. (2) 612, 80 F. (2) 432) absurd, mischievous, or contrary to public interest. That construction should be accepted which will make the statute effective and productive of the most good, as it is presumed that these results were intended by the legislature."

The case of *Riggs* v. *Palmer,* Court of Appeals, N. Y. 1889, 115 N. Y. 506, 510, 22 N. E. 188, is an example of judicial construction giving exceptions to a statute where its strict construction would produce results never intended by the legislature. The court said:

> "Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, * * * and in Smith's Commentaries, 814 many cases are mentioned where it was held that matters embraced in the general words of statutes, nevertheless, were not within the statutes, because it could not have been the intention of the law makers that they should be included.
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> They were taken out of the statutes by an equitable construction and it is said in Bacon: 'By an equitable construction a case not within the letter of a statute is sometimes holden to be within the meaning because it is within the mischief for which a remedy is provided. * * * In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others, the construction is contrary

> to the letter.' * * * In 1 Blackstone Commentaries, 91 the learned author, speaking of the construction of statutes, says: 'If there arise out of them any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. * * * When some collateral matter arises out of the general words and happen to be unreasonable, then the judges are in decency to conclude that this consequence was not foreseen by the parliament, and, therefore they are at liberty to expound the statute by equity, and only *quod hoc* disregard it' * * * Besides, all laws, as well as all contracts, may be controlled by their operation and effect by general fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim on his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."

It is difficult to believe that when Congress enacted Sec. 3226 R. S. it intended that no recovery should be had in the absence of a claim for refund in a case where the Commissioner himself knew he had no legal right to the money he was collecting, and the reason the tax-payer did not have that knowledge was because the Commissioner had caused a false statute to be promulgated, thus concealing the real law. The purpose and reason for Sec. 3226 are entirely absent. With a knowledge of its falsity, the Commissioner by coercion enforced the statute, denied claims filed, and defied injunctions issued by the lower courts in 1929, and only when rebuked by this court in 1932 desisted and refunded some of the money. The Petitioner's money had gone into the Treasury of the United States illegally, and its retention was a fraud, but protected by a literal con-

struction of Sec. 3226 the government still has possession of the money, and so far that possession has been upheld by the courts.

The court below relied upon the case of *Rock Island R. R.* v. *U. S.*, 254 U. S. 141; 65 L. Ed. 188, 41 S. C. 55, where the court used the expression, often since cited, that, "Men must turn square corners when they deal with the government". It appears that the converse of the rule should apply here and that it would be more equitable to say that the government should turn square corners with men, or as stated by Judge Barrett in *In re Blalock*, 31 F. (2) 612, "The construction must square with common sense and sound reasoning".

This court has repeatedly held that fraud and concealment constitute an exception to any statute of limitations. In *Rosenthal* v. *Walker*, 111 U. S. 185; 28 L. Ed. 395, 4 S. C. 382, it cites and approves *Bailey* v. *Glover*, 21 Wall. 342, 22 L. Ed. 636 and quotes from it as follows:

> "To hold that by concealing a fraud or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

Contrary to the example set by this court in the *Standard* case the court below failed and refused to give an equitable construction to a statute which it had already held to be in *pari materia* to the one in which this court gave equitable construction. *Hirst* v. *Gentsch*, 133 F. (2) 247.

Compliance with Sec. 3226 R. S. was prevented or at least made unlikely by the publication and enforcement of the falsified statute by the Commissioner.

Petitioner in 1929 began to suspect that vegetable oils were not included among the ingredients of oleomargarine as defined by law, and filed claim for refund. Those claims were promptly (and it is alleged in the complaint, fraudulently and illegally), rejected by the Commissioner, in 1929 and as late as 1931 so that it was not until 1932, the time of the decision of this court that it can be said that the fact of fraud became certain. In 1929 no claim could be filed nor a suit begun for the sums involved in this case because of the provisions of Sec. 3226 R. S. so that the filing of such claims would have been useless. True, the claim as filed did ask for the return of such other sums as were *legally* refundable, but the Commissioner and Court of Claims held that such amounts were not legally refundable without the filing of a claim. From 1932 to the time of the filing of this suit Petitioner was constantly engaged in litigation with the Bureau of Internal Revenue on some phase of this litigation. This Court has held that under such circumstances a litigant should not be charged with *laches*. *Southern Pacific R. R. Co.* v. *Bogert*, 250 U. S. 843; 63 L. Ed. 1099, 39 S. C. 533.

The general trend of opinions is that Courts of Equity interfere to prevent the bar of the Statute of Limitation where it would be inequitable or unjust to enforce it; and in no case is it better established that they will do so than where the party invoking the bar has perpetrated a fraud. As authority reference is made to:

Story Eq. Jur. Sec. 1521.

Booth v. *Warrington*, 4 Brown, Par. Cas. 163.

Bailey v. *Glover*, 88 U. S. 21 Wall 342; 22 L. Ed. 636.

Stearns v. *Page*, 48 U. S. 7 Howard, 819; 12 L. Ed. 928.

Prevost v. *Gratz,* 19 U. S. 6 Wheat. 491; 5 L. Ed. 311.

Moore v. *Greene,* 60 U. S. 19 Howard 69; 15 L. Ed. 533.

Rosenthal v. *Walker,* 111 U. S. 185; 28 L. Ed. 395.

It would appear that this is a case where traditional equitable principles should apply in full force. The wrong, for which there should be a remedy is openly admitted by the Revenue Department and has been accepted as a fact by every court that has considered it.

In considering this case on a motion to dismiss, the allegations must be taken as true. These allegations as set out in Par. 5 of the Bill charge that the Respondent told Petitioner that the products involved were oleomargarine, and that it was necessary for Petitioner to secure a license, and place stamps on the product, and that Petitioner was given a copy of Reg. No. 9, and told that the business must be conducted in compliance therewith. These allegations are not conclusions, but statements of fact, admitted by the motion to be true.

This court has held that the provisions of Sec. 3226 are not without exceptions, and that the strict requirements of the section may be waived by the Commissioner. In *Tucker* v. *Alexander,* 275 U. S. 228, 72 L. Ed. 253, 48 S. C. 45, the court said:

> "But no case appears to have held that such objection as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery."

It hardly seems likely that Congress intended that a statute which could be waived by the Commissioner himself must be so strictly construed by a court of equity as to protect the Commissioner against the results of his own fraud.

It is in interest of the public that the government should not be allowed to profit by, and become unjustly enriched by the fraud of its executive officers. If such instances are to be passed by with a mere injunctive decree restraining said officers from further proceeding with their illegal acts and frauds, and allow them to be protected in their concealment of the real law by allowing the retention of the proceeds of their fraud, it is really a sanction of such procedure rather than a deterrant. Such acts should be condemned and the money extorted returned to the rightful owners. As was said by Justice McReynolds, in *Goltra* v. *Weeks*, 271 U. S. 536, 70 L. Ed. 1074, 1082, 46 S. C. 613:

> "It is easy enough for us to smile at such stuff, but, unfortunately, the evil effects are not dissipated by gentle gestures. There should be condemnation forceful enough to prevent repetition so long as men have eyes to read."

II. The court below refused to give equitable consideration to this case, holding, "But fraud cannot be averred in general terms and the complaint alleges no fraudulent conduct upon the part of the defendant."

Petitioner asserts that notwithstanding the above statement by the court that every act with which the Respondent is charged in the complaint (Rec. pp. 3-4) was in fraud of Petitioner's rights. First, it alleges that he told Petitioner's President that the product that was being manufactured was oleomargarine, which was not true but was a misrepresentation; next, he told that party that he must

secure a license, which statement was untrue, and then that revenue stamps must be placed on the product, when he knew that such was not required by the real law, because under the real law the product was not oleomargarine. Then, by threats of imprisonment, fines and seizures coerced the illegal payments and concealed his frauds by giving that party a copy of Regulations No. 9 of the Bureau of Internal Revenue which contained the law as it had been falsified by the Commissioner, instead of the real statute, thus concealing the fraud for a long period of time.

This court has said that, "The unjust detention is immoral, and amounts in law to a fraud on the tax-payer's rights." *Bull* v. *U. S.*, 295 U. S. 247, 79 L. Ed. 1421, 55 S. C. 695. In this case there was not only an "Unjust detention", which according to this court's declaration, alone constitutes fraud, but also a fraudulent demanding, taking, and detention, as well as an intentional concealment of the fraud. True, the complaint does not keep repeating the words, "fraud" and "fraudulently" but the accepted rule of pleading does not require this. 12 R. C. L. 348 states the rule as follows:

> "The law has a standard for measuring intent, and declares illegal acts prejudicial to the rights of others to be frauds on those rights, although the parties are innocent of any intention to commit a fraud. (405) Equity may construct a fraud from the circumstances, whereas the law must find it as a fact. (417) It is not necessary to allege fraud in terms if the facts alleged are such as in themselves constitute fraud, or if facts are alleged from which fraud will be necessarily inferred or presumed, for the acts charged are not less fraudulent because the word 'fraud' or 'fraudulent' is not employed by the pleader in characterizing them. In other words, an allegation of facts from which the conclusion of fraud necessarily results is sufficient."

"The general trend of judicial opinion is set out in 37 C. J. (Sec.) Section 78 as follows:

> "It must be made to appear by the facts alleged, independent of mere conclusions, that, if the allegations are true, a fraud has been committed. (80) The charge may be sufficiently made by stating the facts from which fraud is necessarily implied. The term 'fraud' need not be used in the pleadings if facts are averred which show fraud as a conclusion of law."

In the court below the government argued that Petitioner should not have been deceived by the falsified law as published in the Regulations of the Commissioner and that Petitioner has as much access to the true statute as the government did. This court knows that throughout the United States an officer of the Bureau of Internal Revenue is held in very high regard, perhaps fear, and his statements are not questioned. Respondent held such a position and when he advised Petitioner and gave him a document which he stated was the law by which the business should be regulated, Petitioner had a right to rely upon it, and not be compelled to check it with the original statute. 12 R. C. L. 319 gives the general rule in this respect as follows:

> "General Rule.—The rule that fraud cannot be predicated on a failure to disclose facts where the information is as accessible to one party as to the other, and the truth may be ascertained by the exercise of reasonable diligence, does not justify a resort to active deceit or fraud, and hence does not apply where a party in addition to non-disclosure uses any artifice to throw the other party off his guard and to lull him into a false security. * * * The concealment becomes a fraud where it is effected by misleading or deceptive talk, acts or conduct, or is accompanied by misrepresentations, or where in addition to a party's silence there is any statement, word or act on his part which tends

> affirmatively to a suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts; then the line is overstepped and the concealment becomes a fraud."

The acts of which the Petitioner here complains were designated by this court and the Circuit Court of Appeals in the *Miller* v. *Standard* cases (284 U. S. 498, 76 L. Ed. 422, 52 S. C. 260, 49 F. (2) 79) as being merely colorable, a frivolous pretense, in contemptuous disregard of court decisions, an administrative attempt to coerce the payment of money, so unsubstantial as to be frivolous, so arbitrary and capricious that it amounted to an administration fiat, without warrant, etc. Surely, combining all of these the conclusion must be that the acts were fraudulent, and should be sufficient to constitute an exception to Sec. 3226, following the precedent of the court where they were held to constitute an exception to Sec. 3224, the court saying:

> "We think it would be a manifest perversion of the statute in question to permit it to be made the means of enabling a tax official to obtain exemption from being restrained from enforcing an exaction which no legislation purports to provide for * * *" (49 F. (2) 79).

By the same reasoning can it not be said that it would be a perversion of Sec. 3226 to permit it to be made the means of enabling the retention of money the taking of which no legislation purported to provide for?

III. The Respondent by illegally taking and retaining the property of Petitioner, became a constructive trustee.

The court below held that, "The allegation that defendant is a 'constructive trustee' is only the conclusion of the pleader." It appears that the court in coming to this con-

clusion failed to give any consideration to the allegations of the complaint or to legal precedents. The words and directions of Respondent, in his position as an official of the Revenue Department was believed and relied on by the Petitioner. Respondent demanded, received and retained money to which he had no legal right. These facts are all alleged in the complaint, and this court recognized them as facts in the *Standard* case. With all of these facts before it the court had only to apply the well-known precedents as to when a party becomes a constructive trustee. These rules as briefly set out in Pomeroy's Eq. Jur. 5th. Ed. Vol. 4, Sec. 1047 are:

> "By the well settled doctrines of equity a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain and withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust. Sec. 1053: In general whenever the legal title to property, real or personal has been obtained through fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weaknesses or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain or enjoy the beneficial interest equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same. * * *"

Wood on Limitations, p. 1010 sets out the rule as follows:

> "Where one by reason of his position or superior knowledge overreaches another so as to deprive him of his right to money, equity has exclusive jurisdiction in granting relief on the ground of a constructive trust

so that the right to relief will not be barred by the statute of limitations."

These principles as set out in the text books have repeatedly been affirmed by the courts which unanimously hold that courts of equity will interfere to prevent the bar of the Statute of Limitations where it would be inequitable or unjust to enforce it; and in no case is it better established that they will do so than where the party invoking the bar has perpetrated a fraud. Some of the many citations are: *Tabor* v. *Zenner*, 47 Ind. App. 165; *Jones* v. *Van Doren*, 130 U. S. 684, 691; *Payne* v. *Hook*, 74 U. S. 425; Storey Eq. Jur. Sec. 1521; *Bailey* v. *Glover*, 88 U. S. 347; *Rosenthal* v. *Walker*, 111 U. S. 185; Restatement of the Law, under the head of Restitution, Sections 75, 163.

There cannot be any claim but that the complaint alleges that the Respondent obtained money which did not belong to him, and that it did belong to Petitioner, and that its taking was by misrepresentations, duress, and fraud, and further that there was a concealment.

The case is so similar to a case decided by this court, that of *Ward* v. *Love County*, 253 U. S. 17; 64 L. Ed. 751, 40 S. C. 419, that Petitioner cannot refrain from calling attention to it. There the County had assessed exempt Indians, who, to avoid seizure paid the taxes under protest. This court said:

"The moneys thus collected were obtained by coercive means—by compulsion. The county and its officers reasonably could not have registered it otherwise. * * *

As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well settled rule that 'money got through im-

> position' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation', *Marsh* v. *Fulton County*, 10 Wall. 676, 684, 19 L. Ed. 1040; *Louisiana* v. *Wood*, 102 U. S. 294, 298, 299, 26 L. Ed. 153, 155; *Chapman* v. *Douglas County*, 107 U. S. 348, 355, 27 L. Ed. 378, 381. To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course, this would be in contravention of the fourteenth amendment which binds the county as an agency of the state."

This court in this case considered the County a trustee, saying:

> "In legal construction it received the money for the use and benefit of the claimants, and should respond to them accordingly."

IV. Courts of equity are not bound by the Statutes of Limitations or compelled to apply the analogy of the Statute of Limitations where the circumstances are such as to constitute the Respondent a Constructive Trustee and show him to be guilty of actual fraud.

Petitioner's rights having been concealed until after the running of the statutes as set out by Sec. 3226 it could not sue either upon a legal or equitable right within that time, yet the court below seemingly closed its eyes to an apparent and evident fraud and held, acting by analogy to the statute, equity would not relieve. It gave no consideration to those exceptional and extraordinary circumstances which so shocked this court and the lower courts

in the *Standard* cases. This court has repeatedly said that this must depend upon the circumstances. In *Michaud et al* v. *Giraud et al*, 4 Howard, 504, 561; 11 L. Ed. 1076, 1102, this court stated the rule as to analogy, then went further to explain that the circumstances must be the guide in every case and specifically stated the rule as to fraud. It is there said:

> "Although the statutes of limitations do not apply to any equitable demand, courts of equity adopt them; or at least take the same limitations for their guide, in cases analogous to those in which the statutes apply at law. (10 Ves. 467; 1 Cox 149.) Still, within what time a constructive trust will be barred must depend upon the circumstances of the case. (*Boone* v. *Chiles*, 10 Pet. 177.) There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the life time of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

A case of peculiar similarity to the case here is that of *Southern Pacific R. R. Co.* v. *Bogert*, (1919) 250 U. S., 483, 63 L. Ed. 1099, 39 S. C. 533, where a reorganization agreement was dated Dec. 20, 1887; decree of foreclosure sale entered May 4, 1888; the sale made September 1888; and the stock in the new company delivered to the Southern Pacific Company in February 1891. The suit was begun on July 26, 1913. The claim was that the Southern Pacific Company received the stock of the new Houston Company as trustees for the stockholders of the old. The court said:

> "More than 22 years has then elapsed since the wrong complained of was committed. But, the essence of *laches* is not merely the lapse of time. It is es-

> sential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy. Here plaintiffs or others representing them protested as soon as the terms of the reorganization agreements were announced; and ever since they have with rare pertinency, and undaunted by failure, persisted in the diligent pursuit of a remedy. Nor does failure, long continued, to discover the appropriate remedy, though well known, establish *laches* where there has been due diligence, and as the lower courts have found, the defendant was not prejudiced by the delay."

In this case there has been no misleading silence on the part of the Petitioner, no acquiescence, there has been no injury to the Respondent, no records have disappeared, no witnesses died, nor has there ever been a denial of the illegal receipt or retention of the money by the Government.

CONCLUSION.

It is respectfully submitted that writ of certiorari should be issued.

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